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IN THE

Supreme Court of the United States

October Term, 1986

FRANK J. GUARINI, GERALD McCANN, DR. IRWIN SILVERMAN, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN, and WALTER IRWIN,
Petitioners,

-vs-

THE STATE OF NEW YORK, and THE STATE OF NEW JERSEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Whether the exclusive, original jurisdiction of the United States Supreme Court precludes and eliminates the power of state courts to entertain claims by taxpayers and citizens of one state against a sister state for injuries arising out of illegal, extra-territorial and unconstitutional exercise of sovereignty and taxing power by the sister state?

2. Whether the doctrine of sovereign immunity gives a state that engages in unconstitutional, extra-territorial activities within the boundaries of a sister state immunity from law suit in the courts of the sister state?

3. Whether taxpayers of a sovereign state have standing to challenge the invasion of their state by a sister state for the purpose of conducting illegal, extra-territorial, unconstitutional activities, particularly where one of the petitioners has been compelled to pay an unconstitutional sales tax to the invading state?

LIST OF PARTIES

The parties before the trial court were Frank J. Guarini, Gerald Mc Cann, Dr. Irwin Silverman, Dr. Lena Edwards, John M. Stiles, Nidia Davila Colon, Harry Bisharian, Walter Irwin, Robert J. Del Tufo, Rev. Raymond J. Kupke and Dr. Sang Jin Kim. Mr. Del Tufo, Rev. Kupke and Dr. Kim did not appeal from the trial court determination. Dr. Edwards passed away after proceedings were instituted in the New Jersey Supreme Court. Therefore, those four persons are not parties to this petition.

The respondents before this Court are the State of New York and the State of New Jersey.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

LIST OF PARTIES.....ii

TABLE OF CITATIONS.....v

TABLE OF APPENDIX CONTENTS.....ix

PETITION.....1

OPINIONS BELOW.....2

JURISDICTION.....3

CONSTITUTIONAL PROVISIONS and STATUTES INVOLVED.....4

STATEMENT OF THE CASE.....4

REASONS WHY THE WRIT SHOULD BE GRANTED.....1

ARGUMENT

POINT I.....17

THE ORIGINAL EXCLUSIVE JURISDICTION OF THE UNITED STATES SUPREME COURT DOES NOT BAR THIS SUIT IN THE STATE COURTS OF NEW JERSEY BECAUSE THE CONTROVERSY RAISED BY THE LAW SUIT IS NOT BETWEEN TWO STATES.

POINT II.....28

THERE IS NO FEDERAL CONSTITUTIONAL PRINCIPLE THAT

PREVENTS CITIZENS OF ONE STATE FROM SUING ANOTHER STATE WITHIN THE STATE COURTS.

POINT III.....33

TAXPAYERS AND CITIZENS OF ONE STATE HAVE STANDING TO CHALLENGE THE EXTRA-TERRITORIAL UNCONSTITUTIONAL ACTIVITIES OF A SISTER STATE WITHIN THEIR STATE, PARTICULARLY A TAXPAYER WHO HAS BEEN FORCED TO PAY A SALES TAX TO THE INVADING SOVEREIGN.

POINT IV.....36

THE LOWER COURT'S RULING THAT THE LAW SUIT IS BARRED BY THE DOCTRINE OF COMITY IS SO INTERTWINED WITH FEDERAL ISSUES THAT IT IS NOT AN ADEQUATE AND INDEPENDENT STATE GROUND FOR DISMISSING THE SUIT.

CONCLUSION.....42

TABLE OF CITATIONS

CASES	PAGE NO.
Anderson v. City of Madison 444 S.W. 2d 443 (Mo. 1969)	29
Arizona v. New Mexico 425 U.S. 795 (1976)	22,25
Black v. Cutter Laboratories 351 U.S. 292,298 (1956)	37
Central Railroad Co. v. Mayor and Alderman of Jersey City, 209 U.S. 472 (1908)	7
Cincinnati v. Commonwealth 292 Ky. 597, 167 S.W. 3d 709 (1942)	28
Cissna v. Tennessee 245 U.S. 289 (1917)	24,25
Cohens v. Virginia 6 Wheat. (19 U.S.) 264, 404 (1821)	3
Curry v. McCanless 307 U.S. 357 (1938)	34
Durfee v. Duke 375 U.S. 106 (1963)	26
Fox Film Corp. v. Muller 296 U.S. 207,210 (1935)	36

Georgia v. City of Chattanooga
264 U.S. 472 (1924) 28

Harris v. City of Chattanooga
507 F.Supp. 374
(N.D. Ga. 1980) 28

Hilderlider v. LaPlata River
and Cherry Creek Ditch Co.
304 U.S. 92 (1937) 26

Lambert v. Conrad
536 F. 2d 1183
(7th Cir. 1976) 30

Maryland v. Louisiana
451 U.S. 725 (1981) 23

McLeod v. J.E. Dilworth Co.
322 U.S. 327 (1944) 33

Miller Bros. v. Maryland
347 U.S. 340 (1954) 33

Nashville, Chattanooga &
St. Louis Railway v. Wallace
288 U.S. 249, 260-262 (1933) 35

Nevada v. Hall
440 U.S. 410 (1979) 30,31,
39

People v. Streeper
121 Ill. 2d 204
145 N.E. 2d 625 (1957) 29

Robb v. Connolly
111 U.S. 624, 637 (1884) 19

Smith v. Reeves
178 U.S. 436,445 (1900) 3

State v. City of Hudson
231 Minn. 127
42 N.W. 2d 546,548 (1950) 29

State v. Holcomb
85 Kan. 178
116 P. 251 (1911) 29

Texas v. New Mexico
462 U.S. 554
(1983) 20,22

U.S. v. Butler
297 U.S. 1,58
(1935) 35

U.S. CONSTITUTION

Art. 1, sec. 8, 4.3 4

Art. 1, sec. 10 4,6

Art. III, sec. 2, cl.2 4,20

11th Amendment 4

14th Amendment 4

STATUTES

4 Stat. 708 (Ch. 126) 5,6

28 U.S.C. sec. 1251(a) 5,18,19

28 U.S.C. section 1257(3) 3

N.J.S.A. 52:28-1 et seq. 6

56 McKinneys State Law
section 7 6

OTHER AUTHORITIES

Bator, Hart & Wechler's The Federal Court's and the Federal System, 242 (1973) 21

Tribe, American Constitutional Law, sec. 3-19 p. 83 (1978) 35

Tribe, American Constitutional Law, sec. 3-35 4

Wright & Miller, 13A Federal Practice and Procedure, section 3536 (1984) 30

Wright, Law of Federal Courts Sec. 45 (4th Ed.) 19

TABLE OF APPENDIX CONTENTS

	PAGE
Judgment of New Jersey Supreme Court filed January 26, 1987	1a
Decision Superior Court of New Jersey Appellate Division October 16, 1986 - Amended November 21, 1986	3a
Opinion Superior Court of New Jersey, March 18, 1986	8a
U.S. Constitution Art. 1, sec. 8, Cl 1 and 3	50a
U.S. Constitution Art. 1, sec. 10, Cl 3	51a
U.S. Constitution Art. 3, sec. 2, Cl 1 and 2	52a
U.S. Constitution Amendment XI	53a
U.S. Constitution Amendment XIV	54a
28 U.S.C., sec. 1251(a)	55a
4 Stat. 708 (Ch. 126)	56a

IN THE
SUPREME COURT OF THE UNITED STATES
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NO.

FRANK J. GUARINI, GERALD McCANN, DR. IRWIN SILVERMAN, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN, and WALTER IRWIN

Petitioners,

vs.

THE STATE OF NEW YORK and THE STATE OF NEW JERSEY

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

The petitioners, Frank J. Guarini, Gerald McCann, Dr. Irwin Silverman, John M. Stiles, Nidia Davila Colon, Harry Bisharian and

Walter Irwin, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supeme Court of New Jersey, entered in the above-entitled proceeding on January 26, 1987, p. 1a, infra.

OPINIONS BELOW

The opinion of the trial court, the Superior Court of New Jersey, Chancery Division, Hudson County, has been approved for publication but has not yet been published. It is reprinted in the appendix hereto, p. 8, infra.

The opinion of the Superior Court of New Jersey, Appellate Division, has not been reported as of this filing. It is reprinted in the appendix hereto, p. 3a, infra.

The judgment of the New Jersey Supreme Court of January 26, 1987 dismissing the appeal and denying review of the decision of the Superior Court of New Jersey, Appellate Division, has not been reported as of this filing. It is reprinted in the appendix hereto, p. 1a, infra.

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on January 26, 1987. That determination dismissed petitioners' appeal and denied review of the decision of the Superior Court of New Jersey, Appellate Division.

Jurisdiction is invoked on the basis of 28 U.S.C. section 1257(3), Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) and Smith v. Reeves,

178 U.S. 436,445 (1900). See also Tribe, American Constitutional Law, sec. 3-35 (1978) ("neither sovereign imunity nor the Eleventh Amendment bars Supreme Court review of state court judgments in suits in which a state is a party, since supremacy of federal law requires a review of federal questions presented by such judgments").

CONSTITUTIONAL PROVISIONS and STATUTES INVOLVED

The following provisions of the United States Constitution set forth in the appendix are involved: Art. 1, sec. 8, Cl. 1 and 3; Art. 1, sec. 10; Art. III, sec. 2.; 11th Amendment; 14th Amendment, sec. 1.

The following statutes set forth in the appendix are involved: 4 Stat. 708 (Ch. 126); 28 U.S.C. sec. 1251(a).

STATEMENT OF THE CASE

This law suit is an action by a taxpayer who paid taxes to the State of New York on sales transactions occurring within the State of New Jersey, labor union members who have lost job opportunities because labor contracts have been awarded to New York unions for work performed within New Jersey, and taxpayers and citizens of New Jersey who object to the invasion of New Jersey territory by New York and the usurpation of sovereignty and tax revenues by New York. The petitioners' claim is that Liberty Island (formerly

Bedloes Island) and Ellis Island lie within the sovereign territory of New Jersey, and that these petitioners have been injured by the wrongful, illegal and unconstituional assertion of sovereignty by New York over those islands.

On September 16, 1833, Commissioners representing the two states entered into a Compact "respecting the territorial limit and jurisdiction of said states". That Compact was ratified by the States of New York and New Jersey, N.J.S.A. 52:28-1 et seq.; 56 McKinneys State Law, section 7, and approved by Congress in 1834, 4 Stat. 708, (Ch. 126), pursuant to U.S. Const. Art. 1, Section 10. It is upon this Compact that the petitioners base their claim.

The Compact provides in Article 1

for the delineation of territory and sovereignty and specifies that the division of the two states is the middle of the Hudson River. Article 2 of the Compact provides New York solely with limited police powers over the two islands. This Court, in interpreting the Compact, in Central Railroad Co. v. Mayor and Aldermen of Jersey City, 209 U.S. 472 (1908) ruled that the line of sovereignty is the middle of the river, that jurisdictional powers retained by New York on the New Jersey side of the river were of a limited nature concerning commerce and navigation, and that New Jersey retained taxing power over the lands on the New Jersey side of the river as part of her sovereign rights.

At some point subsequent to the

Compact, New York began to exercise sovereign powers over Ellis Island and Liberty Island, including taxing powers, despite the fact that both islands lie on the New Jersey side of the Hudson River. This exercise of power was without authority and constituted usurpation of the sovereignty of New Jersey. This unlawful extension of the sovereignty of New York extended beyond the boundaries of the islands as they existed in 1834 to include territory below the low water mark of the islands on the New Jersey side of the Hudson River. Ellis Island was originally 2.7 acres and it is now 24.5 acres. Liberty Island has also undergone land fill that has substantially increased its size. Despite the fact that the 1834 Compact gave New Jersey

sovereignty, jurisdiction and title to the land under water surrounding the islands, New York has usurped sovereignty and jurisdiction over the land fill.

Petitioners brought this suit as citizens and taxpayers asking the courts to declare the rights of the parties pursuant to the 1834 Compact and to enjoin New York from exercising sovereignty over Ellis and Liberty islands. Two groups of the petitioners have separate, additional, specific injuries. A sales tax was collected by New York from Nidia Davila Colon when she made certain purchases on Liberty Island. Such taxation by New York within the soverign territory of New Jersey constitutes a violation of the Commerce Clause and Due Process Clause

of the Fourteenth Amendment to the United States Constitution. The petitioners' contention that New York engaged in extra-territorial action by taxing beyond its sovereign borders is directly brought into issue by the collection of the sales tax from Ms. Colon.

Similarly, New York's wrongful assertion of sovereignty over the islands has caused labor contracts to be awarded to New York unions on the basis of New York's claim to sovereignty over the islands. Two of the petitioners, Bisharian and Irwin, have lost job opportunities and have been injured due to the wrongful claim of territory by New York.

This matter was originally filed in the Superior Court of New Jersey.

New York filed a petition to remove the action to the United States District Court for the District of New Jersey. Subsequent thereto, the matter was remanded on petitioners' motion to the Superior Court of New Jersey. New York made a motion to dismiss that was granted on the grounds that the United States Supreme Court has original exclusive jurisdiction over the issues in controversy, the doctrines of sovereign immunity and comity immunize New York from suit within the courts of New Jersey and that all of the petitioners, including the petitioner who was compelled to pay a sales tax to New York, lack standing.

The matter was appealed to the Superior Court of New Jersey, Appellate Division. That court affirmed the

decision of the lower court, p. 3a, infra.

The footnote of the Appellate Division decision, p. 7a, infra, concerning the standing of petitioner Nidia Davila Colon does not fully apprise the Court that the issue of Nidia Davila Colon's standing has been raised from the outset of the case. The complaint and the arguments before both the trial court and the Appellate Division asserted that Petitioner Colon was wrongfully taxed in the amount of $1.35 and that the taxation violated the Compact and the U.S. Constitution.

This point was specifically argued before the trial court in petitioners' brief.

"Second, to the extent that

> New York sales tax law permits the collection of sales tax upon Ellis and Liberty Islands, it is unconstitutional. The transaction that is taxed on the merchandise must be within the taxing state. See McLeod v. J.E. Dilworth Co., 322 U.S. 327, 88 L.Ed. 1304 (1944). Plaintiff Nidia Davila Colon contends that she was taxed by New York for sales transactions that occurred solely in the State of New Jersey."

New York was sufficiently notified of these claims by the complaint. Specifically, the First Count, paragrapn 14 provides:

> 14. The defendant State of New York has wrongfully exercised and continues to exercise jurisdiction and sovereignty over Ellis Island and Liberty Island purportedly pursuant to the Compact of 1834 by engaging in the following activities: (a) levying sales taxes on the islands and collecting those taxes; (b) levying state income tax on persons residing or working on the islands and collecting those

taxes; and (c) exercising police powers over the islands and the persons who live and work on the islands or visit the islands.

The entire Fourth Count specifies the claim of petitioner Nidia Davila Colon:

"1. Plaintiffs adopt the paragraphs set forth in the first, second and third counts.

2. On November 8, 1984 plaintiff Nidia Davila Colon purchased the following items on Liberty Island: a replica of the Statue of Liberty, a banner and a souvenir plate.

3. Incident to the purchase of said item, plaintiff was required to pay $1.35 sales tax to the State of New York and its political subdivisions pursuant to the asserted sovereignty and jurisdiction over Liberty Island by the defendant State of New York.

4. The collection and levy of these taxes by the defendant State of New York and its political subdivisions was ultra vires its sovereign and

jurisdictional power.

> 5. Plaintiff was injured in that she was compelled to pay taxes that were due to the defendant State of New Jersey to the defendant State of New York and its political subdivisions. The amount paid by plaintiff to the defendant State of New York and its political subdivisions was greater than that which she would have been required to pay to the defendant State of New Jersey."

The trial court specifically ruled that the claim of petitioner Nidia Davila Colon that she was wrongfully taxed in the amount of $1.35 was insufficient to confer standing, pp. 42a-43a, infra.

Petitioners filed an appeal and a petition for certification with the New Jersey Supreme Court. That court dismissed the appeal and denied the petition in a determination that was

filed on January 26, 1987.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The original exclusive jurisdiction of the United States Supreme Court does not bar this suit in the state courts of New Jersey because the controversy raised by the law suit is not between two states.

2. There is no federal constitutional principle that prevents citizens of one state from suing another state within the state courts.

3. Taxpayers and citizens of one state have standing to challenge the extra-territorial unconstitutional activities of a sister state within their state, particularly a taxpayer who has been forced to pay a sales tax to the

invading sovereign.

4. The lower court's ruling that the law suit is barred by the doctrine of comity is so intertwined with federal issues that it is not an adequate and independent state ground for dismissing the suit.

POINT I

THE ORIGINAL EXCLUSIVE JURISDICTION OF THE UNITED STATES SUPREME COURT DOES NOT BAR THIS SUIT IN THE STATE COURTS OF NEW JERSEY BECAUSE THE CONTROVERSY RAISED BY THE LAW SUIT IS NOT BETWEEN TWO STATES.

The court below ruled that this matter falls within the exclusive original jurisdiction of the United States Supreme Court because it concerns a border dispute, an abrogation and modification of an interstate compact, or a declaration of

the rights of states under a compact. It is respectfully submitted that under the United States Constitution, the United States Code and the law of original U.S. Supreme Court jurisdiction, the trial court erred in ruling that the U. S. Supreme Court has exclusive original jurisdiction over this case.

28 U.S.C.S., section 1251(a) provides:

> "The Supreme Court shall have original and exclusive jurisdiction over all controversies between two or more states."

This federal statute delegates exclusive jurisdiction on the basis of the identity of the parties, not on the basis of the subject matter of the suit. The issues are not raised by the two states in this law suit. Rather,

they are raised by citizens and taxpayers of one of the states.

State courts have the authority to rule on federal questions. Robb v. Connolly, 111 U.S. 624,637 (1884). See also Wright, Law of Federal Courts, sec. 45 (4th Ed). There is no doctrine that permits a Court to decline to hear claims because the outcome of the claim may be important to the public and the parties, when two of the parties happen to be states.

Even though 28 U.S.C. section 1251(a) says that "The Supreme Court shall have original and exclusive jurisdiction of: (1) all controversies between two or more states," the Supreme Court has ruled that in its discretion it may decline to exercise exclusive jurisdiction. In Texas

v. New Mexico, 462 U.S. 554, (1983), Justice Brennan recognized this discretionary power:

> "In recent years, we have consistently interpreted 28 U.S.C. Section 1251(a) (28 U.S.C.S. Section 1251(a)) as providing us with substantial discretion to make case- by-case judgments as to practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction." Id. at 570.

The attempt by Congress to define the original and exclusive jurisdiction of the United States Supreme Court by statute is contrary to the Constitution. U.S. Const. Art. III, sec. 2, Cl. 2 provides:

> In all Cases affecting Ambassadors, other public Ministers and Counsuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other

> Cases before mentioned, the supreme Court shall have appellate Jurisdiction both as to law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The exceptions clause of Article III, Sec. 2, Cl. 2 only applies to the Supreme Court's appellate jurisdiction. It does not apply to the Court's original jurisdiction. A lack of Congressional power to alter the Court's original jurisdiction is explained in Bator, Hart & Wechsler's The Federal Court's and the Federal System, 242 (1973):

> "The Constitution specifically defines the original jurisdiction, and the Supreme Court has repeatedly said that it can be exercised without further enabling action by Congress. See, eg., Kentucky v. Dennison, 24 How. 66,86 U.S. 1861. Presumably this means that Congress has no power to

> contract the jurisdiction any more than to enlarge it."

Therefore, any attempt by Congress to designate certain areas as under the original and "exclusive" jurisdiction of the U.S. Supreme Court goes beyond the power of Congress, and the Supreme Court has the power to determine the meaning of the grant of original jurisdiction under the Constitution. As Justice Brennan's opinion in Texas v. New Mexico, supra, demonstrates, the Court still considers the question of original jurisdiction to be discretionary, despite the statute.

That issues relating to disputes between states may be litigated in a forum other than the Supreme Court is demonstrated by Arizona v. New Mexico, 425 U.S. 795 (1976). When that action was filed in the U.S. Supreme Court,

there was a suit pending in the state courts of New Mexico to determine the constitutionality of New Mexico's electrical energy tax, which was imposed on certain Arizona utilities. The suit was filed by several Arizona utilities. Maryland v. Louisiana, 451 U.S. 725 (1981) explains that one of the utilities was a political subdivision of the State of Arizona. While the suit was pending in the state courts, Arizona filed a motion for leave to file a complaint against New Mexico in the United States Supreme Court. Arizona's motion was denied for the following reasons:

> "In the circumstances of this case, we are persuaded that the pending State court action provides an appropriate forum in which the issues tendered here may be litigated. If on appeal the New Mexico Supreme Court

> should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal ..." 425 U.S. at 797 (emphasis in original).

Cissna v. Tennessee, 245 U.S. 289 (1917) also demonstrates that state courts can determine issues that relate to disputes between states. In Cissna, the state courts of Tennessee passed on the issue of the boundary between Tennessee and Arkansas and the sovereignty of the State of Tennessee over certain lands in the Mississippi River in a law suit in which Tennessee claimed ownership over certain "dry lands formerly a part of the bed of the Mississippi River which lay between low-water marks on the Tennessee side and the middle of the River as it

flowed prior to the change in the channel made in the year 1876 ..." Id. at 290. The U.S. Supreme Court noted that it had jurisdiction because the State court had come "to an erroneous conclusion upon the merits of the question of the proper location of that boundary." Id. at 293. There was no suggestion in the Supreme Court opinion that the State courts of Tennessee did not have jurisdiction to rule on this question. Instead the Supreme Court reviewed and reversed on the merits.

The Arizona v. New Mexico and Cissna v. Tennessee decisions establish that plaintiffs in the case at bar should be permitted to raise issues that concern the two defendant states in a state court forum. This is true even when the issue concerns an

attribute of sovereignty, e.g., taxing powers.

Cases relied upon by the trial court, Durfee v. Duke, 375 U.S. 106 (1963) and Hilderlider v. LaPlata River and Cherry Creek Ditch Co., 304 U.S. 92 (1937), stand for the proposition that issues concerning boundaries litigated in state courts by private parties only, are not binding on the States, who were not party to those cases. At bar, both of the States concerned are parties. Therefore, there is no basis for precluding review of the issues by state courts and to have determinations binding on all parties to the suit.

The state courts of New Jersey are a proper forum to raise the issues and

to litigate those issues. The wrongful taxation is occurring on Liberty and Ellis islands, which petitioners contend lie within the sovereign territory of New Jersey. Petitioners have tangible rights which can be litigated in the state court. The lower court's dismissal of this lawsuit on the ground of excluswive U.S. Supreme Court jurisdiction was erroneous. This Court should grant the petition because the states have failed to act and the issues raised herein define the jurisdictional basis for citizens and taxpayers to enforce the rights of sovereignty in their state courts.

POINT II

THERE IS NO FEDERAL CONSTITUTIONAL PRINCIPLE THAT PREVENTS CITIZENS OF ONE STATE FROM SUING ANOTHER STATE WITHIN THE STATE COURTS.

New York is not entitled to any sovereign immunity for its extra territorial ultra vires acts that take place within New Jersey. When a state engages in activities in another state, that first state is not properly exercising its sovereign powers over the citizens of the state into which it has entered. Therefore, it is not entitled to the protection of sovereign immunity. See Georgia v. City of Chattanooga, 264 U.S. 472, (1924); Harris v. City of Chattanooga, 507 F.Supp. 374 (N.D. Ga. 1980); Cincinnati v. Commonwealth, 292 Ky. 597, 167 S.W.

3d 709 (1942); State v. City of Hudson, 231 Minn. 127, 42 N.W. 2d 546,548 (1950); Anderson v. City of Madison, 444 S.W. 2d 443 (Mo. 1969). Specifically, this sovereign immunity has been held to be inapplicable when property rights and duties in the forum state are concerned. People v. Streeper, 121 Ill. 2d 204, 145 N.E. 2d 625 (1957); State v. Holcomb, 85 Kan. 178, 116 P. 251 (1911).

There can be no doubt that under the allegations of the complaint, the activities of New York on Ellis and Liberty Islands are extra- territorial in nature, and therefore are not entitled to the protection of sovereign immunity. New York has entered upon the sovereign territory of New Jersey and has engaged in taxing activity, a

key attribute of sovereignty. Under this circumstance, suit is properly brought in the state in which the res is located and the state in which the wrongful taxing activity is taking place. Of course for the court to make a final determination as to whether or not New York is acting beyond its territorial borders, the court must reach the merits of the claim. However, a court always has jurisdiction to determine its own jurisdiction. Lambert v. Conrad, 536 F. 2d 1183 (7th Cir. 1976); see also Wright & Miller, 13A Federal Practice and Procedure, section 3536 (1984).

The lower court, relying on Nevada v. Hall, 440 U.S. 410 (1979) failed to recognize that there is no bar to a suit against a state, in this case New

York, in the state courts of another sovereign, i.e., New Jersey. Nevada v. Hall discussed sovereign immunity and reached the following conclusion:

> "This explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts ... But if a federal court were to hold, by inference from the structure from our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the State -- and the power of the people -- in our Union". 440 U.S. at 416 and 426-427 (emphasis added).

The case at bar does not present a situation where there are different state policies that would produce different remedies. There is no conflict in the laws of the two states.

Instead there is a single compact and therefore a single policy that purportedly governs the rights of both states. The exercise of jurisdiction over New York by the courts of New Jersey does not present a conflict in state laws anticipated by footnote 24 in Nevada v. Hall, 440 U.S. at 424, n.24. Furthermore, there is no interference with New York's sovereign responsibilities, because New York is not the true sovereign over these islands. The lower court's decision to immunize New York from suit in New Jersey courts was in error. The petition should be granted so that the constitutional limitations, if any, imposed by Nevada v. Hall, can be fully defined.

POINT III

TAXPAYERS AND CITIZENS OF ONE STATE HAVE THE STANDING TO CHALLENGE THE EXTRA-TERRITORIAL UNCONSTITUTIONAL ACTIVITIES OF A SISTER STATE WITHIN THEIR STATE, PARTICULARLY A TAXPAYER WHO HAS BEEN FORCED TO PAY A SALES TAX TO THE INVADING SOVEREIGN.

New York's taxing activity on Ellis and Liberty Islands is in direct violation of the Commerce Clause and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution because one state may not tax sales transactions in another state. McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944); Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954). Since New Jersey is sovereign over the two islands pursuant to the 1834 Compact, New York is illegally imposing a sales tax on merchandise

bought and sold within the sovereign territory of New Jersey.

State courts have the power to decide issues of extra territorial taxation by one State within the sovereign territory of another State. Curry v. McCanless, 307 U.S. 357 (1938) is a direct example of Supreme Court review of such issues raised and litigated before the state courts of Tennessee wherein the tax commissioner of the State of Alabama was a party.

Persons, who have had a tax extracted contrary to the U.S. Constitution, have been held to have standing under the more strenuous case or controversy test applicable to the federal courts. Challenge by a taxpayer to the collection of a tax clearly establishes a case or

controversy; it is only the circumstance of an attack on a spending program (not an issue at bar) where standing becomes difficult to establish. See United States v. Butler, 297 U.S. 1,58 (1935); Nashville, Chattanooga & St. Louis Railway v. Wallace, 288 U.S. 249, 260-262 (1933); Tribe, American Constitutional Law, sec. 3-19, p. 83 (1978).

Petitioner Nidia Davila Colon paid the sales tax on purchases made on Liberty Island. Taxation of sales transactions by New York on the two islands is an unconstitutional exercise of authority by that state. To deny petitioner Colon standing under this circumstance is not only a blatantly incorrect application of the law of

standing, but it precludes review of a substantial constitutional question that is raised by New York's taxing activity on the two islands.

Standing is present in the case at bar. Therefore, the determination of the lower court should be reversed.

POINT IV

THE LOWER COURT'S RULING THAT THE LAW SUIT IS BARRED BY THE DOCTRINE OF COMITY IS SO INTERTWINED WITH FEDERAL ISSUES THAT IT IS NOT AN ADEQUATE AND INDEPENDENT STATE GROUND FOR DISMISSING THE SUIT.

The Supreme Court may not review a decision of the State Court if that decision rests upon adequate and independent State grounds. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). The Supreme Court makes its

own determination as to the ground on which the judgment rests. Black v. Cutter Laboratories, 351 U.S. 292,298 (1956). In making this determination the Court considers whether the judgment based upon a State ground is independent of the federal question and whether the determination on the state issue is adequate to support the judgment.

In the case at bar, the trial court determined that petitioners could not seek relief in this law suit on the ground of comity. However, the trial court's determination was so intertwined with federal principles of sovereign immunity that the determination on the ground of comity is not adequate and independent.

In rejecting petitioners' law suit

on the ground of comity, the trial court conducted the following analysis:

> "This Court is satisfied that permitting this action would violate principles of comity between States fundamental to our federal system. The fifty United States are part of the Great Union. Disputes between the States over territory and the exercise of governmental authority over that territory, should be heard in the supreme judicial body of that great nation, the United States Supreme Court. Hearing such disputes in the courts of one of the States involved would give the appearance if not the fact of latent partisanship.
>
> The Doctrine of Comity between the States of the United States is rooted in the federal principle that the States must accommodate their diverse concerns and must work together within the Union to foster their common interests. Contests in State courts over territory would produce discord and ill feeling, not amity and comity.
>
> As previously stated in opinion, upholding suits of

> this kind would likely result in a multitude of cacaphonious litigation. Citizens of various states would seek to vindicate in their State courts the perception of those citizens of the territorial and jurisdictional rights or wrongs of their states, vis a vis neighboring states. The resulting chaos and confusion would service no one's best interest.
>
> This case is an excellent example of the need for and the wisdom of the Doctrine of Comity" pp 40a to 42a, infra.

The trial court was declining to exercise jurisdiction on the federal principle that there must be accommodation between the states. As demonstrated in Nevada v. Hall, supra, there is no such federal principle that would bar this law suit. Second, and even more important, is the trial court's decision to exercise comity because the matter should be heard by

the United States Supreme Court. The trial court was laboring under the misconception that the United States Supreme Court has exclusive original jurisdiction over this law suit and that State courts cannot hear such controversies. As argued in Point I, supra, such is not the case.

The trial court's decision is not a truly independent State ground because it relies upon federal concepts, i.e., original exclusive U.S. Supreme Court jurisdiction and because comity is based upon the federal principle that States should not have to answer for their wrongs in the State courts of a sister State. If this Court were to determine that there is no principle of sovereign immunity that bars the law suit, the trial court

would have to reevaluate and reassess its decision on the basis of comity since that decision was grounded in what was a further application of the trial court's view of the doctrine of sovereign immunity.

It is respectfully submitted that the issue of comity is not an independent State ground. The reversal of the lower court's decision on the issues of the exclusive jurisdiction of the U.S. Supreme Court and sovereign immunity would mandate a reassessment of the decision to dismiss on the ground of comity.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be granted.

Respectfully submitted,

MARGULIES, WIND, HERRINGTON
& KATZ
Attorneys for Petitioners

By: Robert E. Margulies

Of Counsel:
Maurice C. Brigadier

On The Petition:
Clifford A. Herrington

April 23, 1987

APPENDIX

SUPREME COURT OF NEW JERSEY
C-479 SEPTEMBER TERM 1986

Filed Supreme Court
January 26, 1987
Stephen W. Townsend,
Clerk

FRANK J. GUARINI, etc. et al:		
Plaintiffs-Petitioners,	:	
and	:	
ROBERT J. DEL TUFO et al.,	:	ON PETITION FOR CERTIFICATION
Plaintiffs,	:	
vs.	:	
THE STATE OF NEW YORK, et al:		
Defendants-Respondents	:	

To the Appellate Division, Superior Court

A petition for certification of the judgment in A-4000-85T5 having been submitted to this Court, and the Court having considered the same:

It is ORDERED that the petition for certification is denied and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to R. 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice at Trenton, this 21st day of January, 1987.

/s/ Stephen W. Townsend
Clerk of the Supreme Court

I hereby certify that the
following is a true copy
of the original on file in
my office

/s/ Stephen W. Townsend
Clerk of the Supreme
Court of New Jersey

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4000-85T5

FRANK J. GUARINI, Member of the House of Representatives, GERALD MC CANN, Mayor of the City of Jersey city, DR. IRWIN SILVERMAN, DR. LENA EDWARDS, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN and WALTER IRWIN,

Plaintiffs-Appellants,

and

ROBERT J. DEL TUFO, REV. RAYMOND J. KUPKE and DR. SANG JIN KIM,

Plaintiffs,

v.

THE STATE OF NEW YORK and THE STATE OF NEW JERSEY,

Defendants-Respondents.

Argued September 23, 1986- Decided Oct. 16, 1986 Amended Opinion - November 21, 1986

Before Judges Michels, O'Brien and Skillman On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County.

Seymour Margulies argued the cause for appellants (Margulies, Margulies &

Wind, attorneys; Mr. Margulies and Maurice C. Brigadier, of counsel; Clifford A. Herrington, on the brief).

Ellen Fried, Assistant Attorney General of the State of New York, argued the cause for respondent State of New York (Clemente, Strenk & Kierman, attorneys; Robert Abrams, Attorney General of the State of New York, of counsel; Judith T. Kramer, Ms. Fried and Jeffrey P. Clemente, on the brief).

Dorothy J. Donnelly, Deputy Attorney General, argued the cause for respondent The State of New Jersey (W. Cary Edwards, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Ms. Donnelly, on the brief).

PER CURIAM.

Plaintiffs Frank J. Guarini, a member of the House of Representatives, Gerald McCann, the Mayor of the City of Jersey City, Dr. Irwin Silverman, Dr. Lena Edwards, John M. Stiles, Nidia Davila Colon, Harry Bisharian and Walter Irwin appeal from a judgment of the Chancery Division that dismissed their declaratory judgment action

against defendants The State of New York and the State of New Jersey. Plaintiffs sought (1) a declaration that the 1834 compact between the States of New York and New Jersey, which established the boundaries between these two states and which was approved by Congress, did not confer jurisdiction or sovereignty over Ellis' Island and Bedloe's (now Liberty) Island to New York; (2) an injunction against New York from collecting or levying taxes on those islands or exercising sovereignty or jurisdiction including police power over or with respect to New York, and (3) the imposition of a constructive trust on past tax revenues collected on the islands by New York. The trial court dismissed the action generally on the following grounds: (1) the Superior

Court of New Jersey lacked jurisdiction over the subject matter because the Supreme Court of the United States has original and exclusive jurisdiction over such boundary disputes and cases involving interpretation of interstate compacts establishing boundaries; (2) plaintiffs lacked the requisite standing to institute an action asserting rights or claims which are the prerogative of the sovereign states, (3) the action was barred by principles of comity and (4) the action was barred by sovereign immunity.

We are satisfied from our study of the record and the arguments presented that the trial court properly dismissed this action. We therefore affirm the judgment under review substantially for the reasons expressed by Judge

Humphreys in his thorough and thoughtful oral opinion of March 18, 1986, as edited by his written opinion dated March 18, 1986 reported in Guarini v. State of New York _____ N.J. Super. ____ (Ch. Div.1986).[1]

Affirmed.

---

1. Our affirmance of the judgment under review is without prejudice to the right of plaintiff Nidia Davila Colon to seek refund of the $1.35 sales tax paid to The State of New York or the City of New York, as the case may be, in connection with the purchase of items from the concession at Liberty Island in the appropriate New York court. This issue was not specifically raised before or decided by the trial court and counsel for the State of New York have recognized plaintiff-Colon's right as an individual to seek such refund. See Hill v. Joseph, 205 Misc. 441, 129 N.Y.S. 2d 348 (Sup. Ct., Special Term 1954).

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-HUDSON COUNTY
DOCKET NO. C-4776-84

FRANK J. GUARINI, Member of the House of Representatives, et al.,

Plaintiffs,

vs.

THE STATE OF NEW YORK and THE STATE OF NEW JERSEY,

Defendants.

Civil Action

OPINION

Decided: March 18, 1986

Seymour Margulies, Esq. Clifford Herrington, Esq. (of counsel) appearing for plaintiff.

Robert Abrams, Attorney General of the State of New York Judith T. Kramer, Assistant Attorney General Ellen Fried, Assistant Attorney General, appearing for defendant State of New York. Jeffrey P. Clemente, Esq. (Local counsel) appearing for defendant State of New York.

W. Cary Edwards, Attorney General of the State of New Jersey Dorothy Donnelly, Deputy Attorney General, appearing for defendant State of New Jersey.

HUMPHREYS, A.J.S.C.

The controversy in this case centers around the Statue of Liberty and the rights and interests of New Jersey and New York to the statue and the land on which the statue rests.[1]

The Statue of Liberty is one of America's most treasured possessions. Its timeless message of hope and promise has found fulfillment in the lives of millions of immigrants and their descendants. The Statue is truly an eternal symbol of the essence of America. The statue lies on an island in the Hudson River, the border between New Jersey and New York. The island and an adjoining island are on the New Jersey side of the river; however, the State of New York pursuant to an Interstate Compact with New Jersey has exercised jurisdiction over the two

[1]This is a refinement of an oral opinion.

islands and the statue for at least 150 years.

Plaintiffs are public officials and prominent citizens who are residents of New Jersey. They contend that since the islands are located in the New Jersey portion of the Hudson River, this Court -should declare that the islands and the statue are under the jurisdiction and sovereignty of New Jersey State Government.

The State of New York moves to dismiss this action asserting various defenses, the most significant of which are: (1) Lack of jurisdiction in this Court; (2) Sovereign immunity of New York from suit; (3) The doctrine of comity between states; and (4) Plaintiffs' lack of standing.

Plaintiffs cross-move for partial summary judgment.

The Court, after a careful examination of the facts and the legal authorities concludes that New York's above defenses are valid and bar this action.

I. JURISDICTION

In 1833 New Jersey and New York entered into an Interstate Compact concerning the Hudson River. The compact was approved by the United States Congress in 1834 and, therefore, became binding upon New Jersey and New York. Poole v. Fleeger, 36 U.S. 184 (1837).

Under the terms of the compact the boundary between New Jersey and New

York is established, with some exceptions, as the middle of the Hudson River. The two islands in question are in the New Jersey half of the river and, therefore, within the territory of New Jersey. The compact, however, expressly provides that New York will retain "present jurisdiction" over the islands, and New York has continued to exercise that jurisdiction to the present day.

Plaintiffs contend that this Court should declare the compact void and ultra vires, or should modify the compact so as to give New Jersey State Government jurisdiction over the islands and the statue. Plaintiffs also allege that the islands have been enlarged through accretion of soil and that this additional area should be

administered by New Jersey State Government. Plaintiffs in their cross-motion for partial summary judgment seek a declaration by this Court that the islands are "a part of the sovereign territory of New Jersey."

Viewed precisely, this case involves either (1) a border dispute; or (2) an abrogation or modification of an interstate compact; or (3) a declaration of the rights of the party states under that compact. In all of these instances, this Court lacks jurisdiction.

If this case is viewed as a border dispute between states, then the proper forum is the United States Supreme Court. Congress has provided that the United States Supreme Court "shall have original and exclusive jurisdiction of

(1) all controversies between two or more states". 28 U.S.C.A. section 1251(a)(1). See also U.S. Const., Art.III, Sec. 2, and Ohio v. Kentucky, 410 U.S. 641, 644 (1973).

Notwithstanding the above statutory language of "exlcusive jurisdiction", the United States Supreme Court has deferred to other forums in "appropriate" cases, i.e. "where there is jurisdiction over the named parties, where the issues tendered may be litigated and where appropriate relief may be had." Illinois v. Milwaukee, 406 U.S. 91, 93 (1972), Maryland v. Louisiana, 451 U.S. 725, 739 (1981), and Texas v. New Mexico, 462 U.S. 554, 570 (1983). Under that criteria, this case and this forum are plainly

not "appropriate". On the contrary, the issues here present a classic case for the exercise of original and exclusive jurisdiction by the United States Supreme Court. The issues do not arise in the context of a suit by private parties over private property, in which the forum might appropriately be a state court. See Durfee v. Duke, 375 U.S. 106, 115-116 (1963). The United States is not a party and, therefore, the discretionary jurisdictional language of paragraph (b) of the Code is not implicated. See 28 U.S.C.A. section 1251(b). Here we deal with a dispute over state boundaries, over an interstate compact, over jurisdiction and sovereignty under that compact. Such an action patently lies only in the United States Supreme Court, not in the state court of one of

the states involved.

Fundamental principles of law preclude state boundaries from being affected by suits brought by individuals. Suits between private parties as to their interests in land cannot bind the states "with respect to any controversy they might have, now or in the future, as to the location of the boundaries between them, or as to their respective sovereignty over the land in question". Durfee v. Duke, supra.

No court, and certainly no state court, has the power to abrogate or modify interstate compacts approved by Congress. See Texas v. New Mexico, supra at 564. No state court has the authority to declare the rights and interests of states over disputed

territory especially when the the dispute has apparently been resolved by an interstate compact. On the contrary, the cases suggest that it is only the United States Supreme Court that has that authority. In Texas v. New Mexico, supra at 567, the Court pointed out that the authority of the United States Supreme Court to resolve controversies between two states "...extends to a suit by one state to enforce its compact with another state or to declare rights under a compact...If there is a compact, it is a law of the United States...and our first and last order of business is interpreting the compact". See also Durfee v. Duke, supra at 110.

Plaintiffs cannot, therefore, through the medium of a lawsuit in a

state court oust or curtail another state's exercise of jurisdiction over land, particularly when that jurisdiction is being exercised pursuant to the express terms of an interstate compact, a "law of the United States". This can be done, if at all, only through an action filed in the United States Supreme Court by a state which is a party to the compact. See Ohio v. Kentucky, supra at 648; Texas v. New Mexico, supra at 570.

II.

SOVEREIGN IMMUNITY

Plaintiffs assert that the doctrine of sovereign immunity has had its day and should not be applied here.

The immunity of the sovereign from suit springs from the inability at

common law to sue the king in his own court without his consent. The king was at the zenith of the feudal hierarchy. He was not subject to suit elsewhere since there was no court higher than his own. See F. Pollock & F. Maitland, History of English Law, 518 (2nd 1899). Much misconstrued is the phrase "A king can do no wrong". As the Magna Carta shows, a king is capable of and may, indeed, tend toward doing wrong. See also William Shakespeare, King Richard the 3rd.

Procedures were, therefore, developed in England to redress the king's wrong and to secure a government under law. This was frequently done by the petition of right which the king could not rightfully refuse. See Crosswhite, "Comity Bows to Wall

Street: Ehrlich-Bober v. University of Houston," 14 Conn. L.Rev. 369, 373 n. 27 (1983). In practice, "the king often endorsed on such petitions let justice be done" which empowered the courts to proceed. Case Comment, "Eleventh Amendment Does Not Preclude Suit Against One State In the Courts of A Sister State: Nevada v. Hall," 440 U.S. 410 (1979), 58 Wash. U.L.Q. 481, 482 (1980).

Notwithstanding these modifications in England, the doctrine of sovereign immunity took firm root in this country, and the states of this union have applied the doctrine in various contexts. However, even in the United States, sovereign immunity has probably never been applied in its "literal breadth". East Orange

v. Palmer, 47 N.J. 307, 328 (1966). Moreover, in recent years it has lost some force. See Willis v. Dept. of Cons. & Ec. Dev., 55 N.J. 534 (1970); P.T. & L. Construction Co. v. Comm'r. Dept. of Trans., 55 N.J. 341 (1970).

Nevertheless, both New York and New Jersey generally retain the doctrine. See The New Jersey Torts Claims Act at N.J.S.A. 59:1-1 et seq. and N.J.S.A. 59:2. The purpose of the New Jersey statute is to "re-establish" sovereign immunity. English v. Newark Housing Authority, 138 N.J. Super. 425, 428 (App. Div. 1976). See Glen v. Rockefeller, 307 N.Y.S. 2d 46, (Sup. Ct. 1970), aff'd 313 N.Y.S. 2d 938 (App. Div. 1970). Compare Cass v. State, 448 N.E. 2d 786,

(Ct. App. 1983).

Plaintiffs do not claim that this is a case in which sovereign immunity has been specifically waived by legislation. Moreover, plaintiffs do not dispute that a State may assert its sovereign immunity in its own courts. Plaintiffs' position is that the U.S. Supreme Court in Nevada v. Hall, supra, determined that a state may not assert its sovereign immunity in the courts of another state. In that case plaintiff was a California resident. He instituted suit in California to recover for a severe injury sustained in an automobile accident in California. The defendant was an employee of a Nevada State entity which owned the car which struck plaintiff. Nevada asserted sovereign immunity as a

defense to the California suit. The California courts held in favor of the plaintiff resulting in judgment for the plaintiff in excess of one million dollars.

The United States Supreme Court held that under the circumstances there, Nevada's sovereign immunity did not protect it from suit in a California State Court. The Court's rationale was based on the theory that the Federal Constitution did not prevent California from permitting a suit against another state to be brought in the California courts.

The Court in Nevada v. Hall, supra, recognized tht its ruling did not mean that a state could be sued in another state as a matter of course. The Court said:

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result. (440 U.S. 424 n. 24).

The present case clearly requires a "different analysis" and a "different result". Plaintiffs in this case have no property rights or interests in the islands or in the statue. Their personal rights are indistinguishable from those of other New Jersey residents. Plaintiffs are challenging in a suit in New Jersey the authority of New York State over land bordering the two states. Plaintiffs, if

successful, would clearly interfere with New York's capacity to fulfill its own sovereign responsibility over those two islands in accordance with and as granted by the 1833 Compact. Exercise of jurisdiction by this Court would thereby pose a "substantial threat to our constitutional system of cooperative federalism". Id.

Morever, if this suit were allowed to stand, Pandora's box would surely be opened. The escaping furies would spawn a cascade of law suits as citizens challenged the governmental authority of neighboring states over lands on their borders. New Jersey borders three states and is no stranger to boundary disputes. See New Jersey v. Delaware, 291 U.S. 361 (1934); Central R.R. Co. v. Jersey City, 209

U.S. 473 (1908). Suits almost without number would likely be brought in New Jersey by its citizens, as well as by Pennsylvania, Delaware and New York citizens in their state courts. The governments of those states would find themselves unwillingly embroiled in a plethora of litigation over boundary and jurisdictional issues, many of which could and should be resolved by the states through negotiations not litigation.

Furthermore, allowing this suit is out of step with the history of our nation, as well as basic tenets of our federal system. Our founding fathers were opposed to permitting citizens from one state to sue another state. See Nevada v. Hall, supra at 435-436, (Rehnquist, J. dissenting).

In 1793, the United States Supreme Court permitted such a suit in Chisholm v. Georgia, 2 Dall, 419, 1 L. Ed. 440 (1793). That decision was promptly overturned by the adoption of the Eleventh Amendment. That Amendment by its terms deprives only the federal courts of jurisdiction over cases in which citizens of one state sue another state. However, "...the States that ratified the Eleventh Amendment thought that they were putting an end to the possibility of individual states as unconsenting defendants in foreign jurisdictions". Nevada v. Hall, supra at 437. (Rehnquist, J., dissenting). It would make no sense for the states to foreclose "the neutral federal forums only to be left to defend suits in the courts of other States". Id.

The majority in Nevada v. Hall, supra, may have opened the door somewhat to suits against a state by residents of another state in the courts of that latter state. Plaintiffs, however, would fling the door wide open. Even the majority in Nevada v. Hall would not sanction such an expansion, especially where at issue is the governmental authority of the state being sued. Id.

Plaintiffs contend that sovereign immunity does not apply to activities of New York which take place in New Jersey territory. That argument, however, is unsupported by persuasive authority. This is not an in rem or quasi in rem action in which plaintiffs are asserting property rights in real or personal property located in New

Jersey. New York's "activities" in New Jersey in this case are not as a trespasser or interloper; New York is acting pursuant to the express terms of an interstate compact, which is the equivalent of a law of the United States. See Texas v. New Mexico, supra at 567. Any challenge to New York's authority to so act requires a declaration of rights under the compact. Such a declaration must be sought in the United States Supreme court. See Ohio v. Kentucky, supra; Texas v. New Mexico, supra at 554, and Point I of this opinion.

Plaintiffs also contend that New York will not in its own courts recognize sovereign immunity for another state; hence, New Jersey should do the same. Plaintiffs rely on the

case of Ehrlich-Bober & Co., Inc. v. University of Houston, 49 N.Y. 2d 574, 404 N.E. 2d 726, 427 N.Y.S. 2d, 604 (Ct. App. 1980). In that case a New York company had commercial dealings with the University of Houston, an entity of the State of Texas. Tne New York company instituted suit against the University of Houston in the New York courts. The New York Court of Appeals held that New York's public policy required the New York courts to permit suits by New York companies in New York courts against other states or other state entities in cases arising out of "a wholly commercial transaction centered in New York". Id. at 532.

Here, however, we are dealing with a governmental function, not a

commercial transaction. Moreover, New Jersey's public policy does not require this suit to be brought. See Point III of this opinion.

Turn this case around. Nothing in Ehrlich-Bober, supra indicates that New York would permit in its courts a suit by New York citizens challenging New Jersey's long-standing governmental authority over territory in New York when New Jersey had been exercising that authority for more than a century pursuant to an interstate compact to which New York was a party. In fact, a contrary conclusion was reached in the case of The People v. The Central R.R. Co. of New Jersey, 42 N.Y. 283 (1870). In that case the New York Court found that New Jersey had jurisdiction over certain piers, wharfs, docks and other

improvements in the Hudson River pursuant to the 1833 Compact. The Court said that under those circumstances the New York courts did not have and should not take jurisdiction with respect to those improvements. The Court said that the exercise of such jurisdiction by New York would be "entirely untenable and in conflict with the fundamental principle of law and justice, that no party shall be a judge in his own cause". Id. at 305. That holding and language is squarely applicable here.

This action is barred by the doctrine of sovereign immunity. Residents of New Jersey are attempting here to challenge the governmental authority of New York over territory which by interstate compact is under

New York's jurisdiction. Permitting this suit would violate principles of cooperate federalism and interfere with New York's exercise of sovereign responsibilities pursuant to that interstate compact. Nevada v. Hall, supra at 424 n.24; see also Id. at 432 (Rehnquist, J., dissenting); Id. at 427 (Blackmun, J., dissenting).

III.

COMITY

The majority of the United States Supreme Court in Nevada v. Hall, supra, concluded that the United States Constitution would not bar all suits against states instituted by the citizens of another state in the courts of that latter state. The Court in Nevada v. Hall, however, did not rule

on whether in a given case a state court could or should decline to entertain the suit on the ground of comity.

The doctrine of comity has been described as:

> ...neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. (Hilton v. Guyot, 159 U.S. 113, 163-164 (1895)).

Chief Justice Taney of the United States Supreme Court stated in Bank of Augusta v. Earle, 38 U.S. 517, 590 (1839), that there should be a greater degree of comity among the states than

among foreign nations. The states, the Chief Justice said, are "members of the same great political family" and have "deep and vital interests" which bind them "so closely together."

Our New Jersey Supreme Court has stated that:

> ...comity is not a binding obligation on the forum state, but a courtesy voluntarily extended to another state for reasons of 'practice, convenience and expediency...Deference is not offered, however, when it would contravene the public or judicial policy of the forum state. Thus, application of comity involves an examination by the Court of both the public policy of the forum state and the impact on that policy of enforcing the foreign proceeding. (Philadelphia v. Austin, 86 N.J. 55, 64 (1981)).

The plaintiffs contend that comity should not be applied here. They again

rely on Ehrlich-Bober, supra. That case, as previously stated, involved a "wholly commercial transaction" centered in New York. It was for that reason that the majority declined to permit the assertion of "governmental immunity as a matter of comity". Ehrlich-Bober is not applicable since this case does not involve a commercial transaction. On the contrary, the question here "goes to the very heart of the governmental function" and, therefore, the doctrine of comity requires dismissal. See Ehrlich-Bober, supra at 580-581 in which the Court implied that comity should bar the action when the question at issue goes to the very heart of the governmental function.

The "public" or "judicial policy"

of New Jersey would not be "contravened" by declining to hear this suit. See Philadelphia v. Austin, supra at 64. The State of New Jersey has made no such argument to this Court. On the contrary, New Jersey in its answer demanded the dismissal of this action and asserted various defenses to the suit as follows:

> First Defense. Complaint raises a boundary dispute and a dispute as to the respective sovereignty of Defendants, the State of New York and State of New Jersey, and jurisdiction properly lies in the United States Supreme Court;
>
> Second Defense. The complaint failed to state a cause of action upon which relief may be granted;
>
> Third Defense. This action is barred by the 11th Amendment of the United States Constitution;
>
> Fourth Defense. Plaintiffs lack standing to raise the

issues specified in their complaint.

Moreoever, New Jersey in its answer "demands judgment dismissing the complaint together with costs of suit and such other relief as the Court deems just and proper."

New Jersey has not amended its answer. Hence, the answer stands as an expression of New Jersey's formal position in this lawsuit.

In a letter brief, New Jersey attempts to shift position. New Jersey Contends in that brief that the motion of New York for dismissal should be denied "since jurisdiction of the res of the dispute lies within the State of New Jersey." However, New Jersey also states in its brief that it takes no position on the issue of New York's

sovereign immunity, nor does New Jersey abandon a separate defense of U.S. Supreme Court jurisdiction.

New Jersey states further in its brief (but not in any pleading or motion), that summary judgment should be granted "declaring New Jersey sovereign over the islands." New Jersey argues that the word "jurisdiction" in the 1833 Compact should be narrowly construed so as to refer only to the right to exercise legal process on the islands.

New Jersey's position was not clarified by oral argument. As best as can be gleaned, New Jersey's position is that it does not seriously object to dismissal of this suit, but if the suit is not dismissed, then New Jersey wishes to assert whatever legal rights

or remedies it may have.

In any event, the Court concludes that the State of New Jersey would not view the dismissal of this action on the ground of comity as "contravening" the "public" or "judicial policy" of New Jersey. Apparently the States of New Jersey and New York are proceeding by discussion and accommodation to resolve any differences they may have. That process is clearly preferable to litigation.

As the U.S. Supreme Court said in Texas v. New Mexico:

> Time and again we have counseled States engaged in litigation with one another before this Court that their dispute 'is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of the representatives of the states

> which are vitally interested than by proceedings in any court however constituted.' Id. at 575.

This Court concludes that permitting this action would clearly violate fundamental principles of comity between states which are fundamental to our federal system. The 50 United States are parts of a great union. Disputes between the states over territory and the exercise of governmental authority over that territory should be heard in the supreme judicial body of that great union, the United States Supreme Court. Hearing such disputes in the courts of one of the states involved would give the appearance if not the fact of blatant partisanship.

The doctrine of comity between the states of the United States is rooted

in the basic federal principle that the states of this federal union must strive to accommodate their diverse concerns and work together to foster their common interests. Contests in state courts over territory and jurisdiction over that territory would produce discord and ill feeling, not comity and amity. Upholding suits of this kind would result in a multitude of cacophonous litigation. Citizens of various states would seek to vindicate in their state courts their perception of the territorial rights or wrongs of their states vis-a-vis neighboring states. The resulting chaos and confusion would serve no one's best interests.

This case is an excellent example of the need for and the wisdom of the

doctrine of comity.

IV.

STANDING

Plaintiffs assert that they have standing to sue under the liberal standing rules in New Jersey. The New Jersey Supreme Court has held that "in cases of great public interest, any 'slight additional private interest' will be sufficient to afford standing." Salorio v. Glaser, 82 N.J. 482, 491 (1980).

Plaintiffs contend this is a case of "great public interest" and that they meet the requirements of a "slight additional private interest." As to the private interest, one of the Plaintiffs purchased items on one of the islands and paid $1.35 sales tax to New York.

Two of the Plaintiffs contend that they have a private interest based on the potential award of labor contracts to New Jersey labor unions rather than New York labor unions, if New York is ousted from jurisdiction over the islands.

Plaintiffs "private interests" are of gossamer texture. Moreover, their interests do not impinge on the major issues in this case, whether this Court can and should declare that New York may not exercise governmental authority over the islands and the Statue pursuant to the interstate compact. As to that vital issue, Plaintiffs' interests are no more or less than any citizen of the United States, since the Statue of Liberty belongs to all of us.

Plaintiffs are challenging New

York's right to exercise governmental authority over certain territory. However, the right to fix and determine boundaries and to exercise governmental authority over that territory are basic attributes of sovereignty. Justice Story said nearly 150 years ago in Poole v. Fleeger:

> It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries, so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the states of this Union, unless it has been surrendered under the

> constitution of the United States. So far from there being any pretense of such a general surrender of the right, it is expressly recognized by the constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of the congress. The constitution declares, that 'no state shall, without the consent of congress, enter into any agreement or compact with another state;' thus plainly admitting that with such consent, it might be done; and in the present instance, that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both states. Id. at 209.

See Also Hinderlider v. La Plata Co., 304 U.S. 92, 106 (1937) (Brandeis, J.).

The Compact here was entered into as a part of the general right of sovereignty, the right to govern. It is binding and conclusive on the states

and on "the citizens of both states". Hinderlider v. La Plata Co., supra at 104. See also Poole v. Fleeger, supra at 209. Individual citizens simply do not have standing to have determined by a court those matters reserved to sovereign governments.

Our courts treasure the legal rights of all of our citizens and guard zealously access to the courts to secure those rights. To that end, the Courts in New Jersey have permitted citizens to bring actions in a great variety of matters, even though the citizens' personal interest may be slight. See, e.g., Salorio v. Glaser, supra; N.J. Chamb. Commerce v. N.J. Elec. Law Enforce. Comm., 82 N.J. 57 (1980). However, our form of government is a constitutional

republic, not a pure democracy. The elected representatives of the people must govern. If state government acts constitutionally but not wisely, then the remedy of the people is at the ballot box not in a courtroom. The people cannot exercise rights of sovereignty reserved to state governments or ask a court to do so at their request. In that direction lies anarchy or judicial hegemony.

Plaintiffs in this case are thus in a real sense "strangers to the controversy" and, therefore, lack standing. See Bergen County v. Port of N.Y. Authority, et al., 32 N.J. 303, 307 (1960). Any controversy here is between the plaintiffs' duly elected government, the State of New Jersey, and the government of the State of New

York. If the two governments cannot resolve that matter amicably, then redress in the United States Supreme Court is available to those two governments. Fundamental principles of law and government plainly demonstrate plaintiffs' lack of standing to maintain this suit.

CONCLUSION

This Court lacks jurisdiction to resolve border disputes between states; or to modify or abrogate interstate compacts between states; or to declare the rights of the party states under such compacts. Exclusive jurisdiction of such actions rests in the United States Supreme Court. The doctrine of sovereign immunity bars this action. Principles of comity between states fundamental to our federal system

require that this suit be dismissed. Plaintiffs lack standing to institute suit asserting rights or claims which are the prerogatives of sovereign states.

The Statue of Liberty was a gift from the people of France to the people of the United States of America. It was not a gift to New Jersey or to New York. The statute belongs to all of us. This action is dismissed with costs.

U.S. CONSTITUTION
ART. I, SEC. 8
Cl. 1 and 3

Section 8. (1) The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; * * *

(3) To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.

U.S. CONSTITUTION
ART. I, SEC. 10
Cl.3

(3) No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. CONSTITUTION
ART. III, SEC. 2, Cl. 1 & 2

Section 2. (1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more states; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(2) In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONSTITUTION
AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Sec. 1251(a)

1251. Original jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

4 Stat. 708 (Ch.126)

An Act giving the consent of Congress to an agreement or compact entered into between the state of New York and the state of New Jersey, respecting the territorial limits and jurisdiction of said states.

WHEREAS commissioners duly appointed on the part of the state of New York, and commissioners duly appointed on the part of the state of New Jersey, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two states, have executed certain articles, which are contained in the words following, viz:

Agreement made and entered into by and between Benjamin F. Butler, Peter Augustus Jay and Henry Seymour, commissioners duly appointed on the part and behalf of the state of New York, in pursuance of an act of the legislature of the said state, entitled "An act concerning the territorial limits and jurisdiction of the state of New York and the state of New Jersey, passed January 18th, 1833, of the one part; and Theodore Frelinghuysen, James Parker and Lucius Q.C. Elmer, commissioners duly appointed on the part and behalf of the state of New Jersey, in pursuance of an act of the legislature of the said state, entitled "An act for the settlement of the territorial limits and jurisdiction between the states of New Jersey and New York," passed February 6th, 1833, of the other part.

ARTICLE FIRST. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be tne middle of the said river, of the Bay or New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

ARTICLE SECOND. Tne state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

ARTICLE THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel creek, and of and over the lands covered by the said waters to the low-water mark on the westerly or New Jersey side thereof, subject to the following rights of property and jurisdiction of the state of New Jersey, that is to say:

(1) Tne state of New Jersey shall have the exclusive right of property in and to the land under water, lying west of the middle of the Bay of New York and west of the middle of that part of

the Hudson which lies between Manhattan island and New Jersey.

(2) The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of the said state, and of and over all vessels aground on said shore, or fastened to any such wharf or dock, except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the state of New York, which now exist or which may hereafter be passed.

(3) The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters; provided, that the navigaiton be not obstructed or hindered.

ARTICLE FOURTH. The state of New York shall have exclusive jurisdiction of and over the waters of the Kill von Kull, between Staten Island and New Jersey, to the westernmost end of Shooter's island in respect to such quarantine laws and laws relating to passengers as now exist, or may hereafter be passed under the authority of that state, and for executing the same; and the said state shall also have exclusive jurisdiction, for the like purposes, of and over the waters of the sound from the westernmost ends of Shooter's island to Woodbridge creek, as to all vessels bound to any port in the said state of New York.

ARTICLE FIFTH. The state of New

Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound between Staten island and New Jersey, lying south of Woodbridge creek, and of and over all the waters of Raritan bay, lying westward of a line drawn from the lighthouse at Prince's bay to the mouth of Matavan creek, subject to the following rights of property and jurisdiction of the state of New York, that is to say:

(1) The state of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten island.

(2) The state of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten island, and of and over all vessels aground on said shore, or fastened to any such wharf or dock, except that the said vessels shall be subject to the quarantine or health laws and laws in relation to passengers of the state of New Jersey, which now exist or which may hereafter be passed.

(3) The state of New York shall have the exclusive right of regulating the fisheries between the shore of Staten island and the middle of the said waters; provided, that the navigation of the said waters be not obstructed or hindered.

ARTICLE SIXTH: Criminal process issued under the authority of the state of New Jersey against any person accused of an offense committed within

that state, or on board of any vessel being under the exclusive jurisdiction of that state, as aforesaid, or committed against the regulations made or to be made by that state, in relation to the fisheries mentioned in the third article; and also civil process issued under the authority of the state of New Jersey against any person domiciled in that state, or against property taken out of that state to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiciton of the state of New York, unless such person or property shall be on board a vessel aground upon or fastened to the shore of New York, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New York.

ARTICLE SEVENTH. Criminal process issued under the authority of the state of New York against any person accused of an offence committed within that state, or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid, or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the fifth article; and also civil process issued under the authority of the state of New York against any person domiciled in that state, or against property taken out of that state, to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiction of the state of New

Jersey, unless such person or property shall be on board a vessel aground upon or fastened to the shore of the state of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New Jersey.

ARTICLE EIGHTH. This agreement shall become binding on the two states when confirmed by the legislatures thereof, respectively, and when approved by the Congress of the United States.

Done in four parts (two of which are retained by the commissioners of New York, to be delivered to the governor of that state, and the other two of which are retained by the commissioners of New Jersey, to be delivered to the governor of that state,) at the city of New York this sixteenth day of September, in the year of our Lord one thousand eight hundred

and thirty-three and of the independence of the United States the fifty-eighth.

B. F. BUTLER,
PETER AUGUSTUS JAY,
HENRY SEYMOUR,
THEO. FRELINGHUYSEN,
JAMES PARKER,
LUCIUS Q.C. ELMER.

And whereas the said agreement has been confirmed by the legislatures of the said state of New York and New Jersey, respectively, -- therefore,

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED, That the consent of the Congress of the United States is hereby given to the said agreement, and to each and every part and article thereof, PROVIDED, That nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

APPROVED, June 28, 1834.